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In the Supreme Court

OF THE

United States

No. 67, Original

State of Idaho, ex rel. JOHN V. EVANS, Governor;
DAVID H. LEROY, Attorney General;
JOSEPH C. GREENLEY, Director, Department of Fish and Game,
Plaintiff,

v.

STATE OF OREGON, STATE OF WASHINGTON,
Defendants

PLAINTIFF'S EXCEPTIONS TO REPORT AND SUPPLEMENTAL REPORT OF THE SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO

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STATEMENT

On February 2, 1979 Special Master Jean S. Breitenstein submitted the report and supplemental report (hereafter "Master's Report") on the defendants' affirmative defenses to the United States Supreme Court. The Master's recommendation to the Court was dismissal of Idaho's complaint for failure to join the United States. The State of Idaho respectfully submits the following exceptions to the Master's Report.

INTRODUCTION

The amended recommendation of the Special Master imposes a peculiar dilemma upon the United States Supreme Court. Although the Master concluded the United States to be an indispensable party whose joinder is barred by sovereign immunity, the recommendation was that, "the dismissal be without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement." Master's Report, 31.

This finding of indispensability cloaked with federal immunity has created an unreasonable blockade to Idaho's constitutional right to litigate its grievance against Oregon and Washington, notwithstanding the rationalization that dismissal without prejudice will somehow provide a forum in future years.

A. The Master's Findings of Factual Background Are Supportive of Idaho's Claim.

Idaho brought suit against Oregon and Washington in the United States Supreme Court to protect its diminishing runs of spring chinook salmon, summer chinook salmon, and summer steelhead. The inability to negotiate any meaning-

ful alteration of downstream harvest practices in the lower Columbia River led Idaho to such action. The controversy over allocation of anadromous fish returning up the Columbia River has been going on for years. Master's Report, 5. Idaho's efforts to become a member of the Oregon-Washington Columbia River Fish Compact have failed. Master's Report, 6. Idaho is not a party to *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969), *affirmed and remanded*, 529 F. 2d 570 (9th Cir. 1976) which is presently pending under a five year settlement agreement, sanctioned by the Oregon District Court, that establishes an allocation of anadromous fish in the Columbia River among Oregon, Washington and four Indian Tribes.[1] Master's Report, 5, 12. That settlement agreement is attached to this brief as Appendix A. Because Idaho's complaint involves a controversy between states, no forum other than the United States Supreme Court is available to Idaho for adjudication of its grievance. Master's Report, 14.

Except for the question of federal indispensability, the Master's findings and conclusions are generally supportive of Idaho's position. The Master properly framed the overriding issue to be, "...not ownership or regulation [of anadromous fish migrating through interstate waters] but power of the lower states to prevent Idaho from receiving its share of a natural resource." Master's Report, 15-16. Idaho claims that the exercise of authority by Oregon and Washington to regulate the anadromous fishery resources within their borders

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[1]This settlement agreement is entitled, "A Plan for Managing Fisheries On Stocks Originating From the Columbia River and its Tributaries above Bonneville Dam," and was adopted by Order of the United States District Court for the District of Oregon on February 28, 1977, *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969).

has deprived Idaho of its equitable share of the returning runs of salmon and steelhead. Master's Report, 15. To that end, the Master concluded that Idaho's complaint presented a justiciable controversy between states which was properly before the United States Supreme Court for consideration and determination under the Court's original and exclusive jurisdiction. Master's Report, 4, 17.

Specifically, the Master made findings that "[t] he contribution of Idaho to the total System fishery is substantial" and "that Idaho produces many fish and receives few." Master's Report, 10. Based upon those findings, the Master concluded, "[t]o a *substantial* extent, Idaho is *subsidizing* the *downstream* fishery, *both Indian and non-Indian*." Master's Report, 11. (Emphasis added.)

Such findings support Idaho's constitutional right to present its claim for equitable apportionment of the upriver salmon and steelhead resource.

B. The Position of the Federal Government Has Been Split on the Issue of Federal Involvement in this Litigation.

At the November 8, 1978 hearing regarding exceptions to the Master's draft report, the Special Master graciously delayed the filing of his final report until February 1, 1979 in order to allow the United States additional time to consider the question of federal intervention. Contrary to the recommendation of the Department of the Interior,[2] the Department of Justice ultimately adhered to its position of declin-

[2]The recommendation of the Department of Interior supporting federal intervention in this litigation was made by letter to the Department of Justice. Although the Department of Interior's letter was not dated, it was marked as received on January 29, 1979.

ing intervention. The official Department of Interior recommendation to intervene is attached to this brief as Appendix B. Thus, the official position of the United States lacks the clear cut support of a federal department that is highly active in anadromous fishery management in the Columbia River Basin. One government document made available to the State of Idaho analyzed the pros and cons of federal involvement as follows:

* * *

> There are three arguments in favor of intervention: (1) Our duty as trustee to the Shoshone-Bannock Tribe — which is no less than our conflicting duty to defend the status quo insofar as it favors the four Tribes party to the *Oregon* settlement; (2) *the apparent justice of Idaho's claim that it produces many (if not most) of the fish and yet enjoys only a minimal share of the harvestable resources, which is "fished out" before the fish return to Idaho waters;* and (3) *the principle that, wherever the merits lie, we ought not invoke our indispensability and sovereign immunity to block bona fide litigation between States when no other forum is available for resolution of the dispute.*
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> * * *
>
> . . . The present plan, adopted by the distict court in the *Oregon* case provides that Idaho's sports fishermen shall never see more than 7,500 harvestable salmon no matter how large the run. *This seems inequitable. Nor does Idaho have any obvious alternative forum to test its claim.* If it sought to intervene in the *Oregon* district court case, it would probably be compelled, at this late date, to accept the existing plan, until it expires some two years hence. Besides, any posture adversary to Oregon and Washington would presumably defeat the jurisdiction of the district court.

> On the other hand, there are powerful arguments against this original suit. There *is* an existing settlement which ought not lightly be disturbed. We *do* have an obligation to the four Tribes on whose behalf we sought and obtained a judgment in the *Oregon* case. Also, if we were to intervene in the original action, it seems doubtful if we could prevent opening up to controversy the federal government's management of the off-shore fishery and our operation of the Columbia River dams — very complex and delicate issues. And, finally, we may question whether the Supreme Court is equipped to exercise the continuing jurisdiction necessary to enforce any judgment it may render. In sum, *the case is to be avoided, if, in conscience, that can be done.*[3] *(Emphasis added.)*

That document is attached in its entirety as Appendix C. The rationale of the United States represents a classic use of the concept of sovereign immunity to thwart meritorious litigation.

Idaho merely seeks the opportunity to present its claim before the Supreme Court. Obviously, before relief may be had, Idaho will have to substantiate its equitable entitlement to the satisfaction of the Court. If the United States has interests to protect, the federal government should protect those interests in court, not behind a cloak of immunity to the detriment of Idaho's constitutional right to adjudicate its grievance against the defendant states.

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[3]United States Government memorandum from Louis F. Claiborne to Wade H. McCree, Jr., (January 30, 1979). The Idaho Attorney General's office has been advised by the United States Department of Justice that, in quoting this document, it should be noted that the position of the United States is stated in its formal filings and not in preliminary papers.

C. Biological Concerns Are the Bases for Idaho's Action.

Although Idaho is an inland state, it maintains over 3,000 miles of quality anadromous fish habitat. Master's Report, 9. Most of this habitat is found in geographically isolated wilderness areas within the state. Despite the vastness of available habitat, Idaho's returning runs have significantly declined during recent years as a result of man's impact on these runs. By its complaint Idaho seeks equitable entitlement to an adequate spawning escapement and a reasonable sports fishery. Without such determination, Idaho has no guarantee that production efforts will ever enhance runs returning to its waters.

There is no doubt that Idaho salmon and steelhead suffer mortalities as a result of factors besides downriver harvest. The majority of such loss is caused by eight federal dams in their migratory path on the Columbia and Snake Rivers in Oregon and Washington. Idaho, located upstream from all eight dams, is subjected to the entire passage loss incurred during downstream and upstream migrations while the defendant states enjoy a harvest of Idaho-bound adult salmon and steelhead before the fish reach the first dam, Bonneville, on their return migration. Equitably, Idaho should not be forced to absorb the effects of passage loss as well as excessive downstream commercial and sport harvests.[4]

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[4]Exhibit W-3, *Columbia Basin Salmon and Steelhead Analysis,* Summary Report, Pacific Northwest Regional Commission (September, 1976) states at 15 that "[t]he once-productive upriver Spring Chinook run is in precarious condition." Exhibit W-3 further states that "[t]he condition of the Snake River segment [of summer chinook] is particularly precarious," and that "[b]oth segments of the upriver Summer Steelhead run are in serious trouble . . ." *Id.* at 17, 19.

Moreover, each major salmon and steelhead run which annu-

Evidence before the Court demonstrates that the United States has exercised *no* control over allocations of fishery resources among competing users in the Columbia River Basin.[5] For that reason, Idaho submits that the presence of the United States as a party is unnecessary and urges the Court to allow this case, where allocation is the issue, to proceed to trial.

SUMMARY OF ARGUMENT

This action is brought by the State of Idaho in order to protect a dwindling natural resource. Contrary to the report of the Special Master the relief sought by Idaho and its citizens can as a practical matter be granted.

The reliance of the Master upon the concept of sovereign immunity coupled with a strict interpretation of Fed. R.

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ally returns to the upper portion of the Columbia River Basin is currently being reviewed by the United States Department of Interior for possible classification as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531, et seq. See *A Question of Balance*, Summary Report, Pacific Northwest Regional Commission (November, 1978). (*A Question of Balance* was produced under grant agreement with but does not necessarily reflect the views of: Pacific Northwest Regional Commission, National Marine Fisheries Service, U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, and Columbia River Inter-Tribal Fish Commission.)

[5]Record, 221, 244; Exhibit W-4, at Q-1. Exhibit W-4, at Q-1 states: "The authority for management of fisheries and regulation of catch within the boundaries of Idaho, Oregon and Washington is invested in the states. Hatchery production of salmon and steelhead is dependent upon state approval. The federal government has no general fishery regulatory authority within the states, excepting situations which are provided for by treaties with Indian tribes or foreign nations, upon federal reservations which are not considered to be part of a state, or by special agreement or act. These exceptions appear to have relatively little effect on the fisheries management of the Columbia River. Problems with Indian fisheries stem from treaty interpretations and not from any particular federal managerial authority in fisheries.

Civ. P. 19 is contrary to basic concepts of federalism. The Master's recommendation, if upheld, will prevent the State of Idaho from resolving this dispute in the manner intended by the framers of the Constitution. Moreover, the residents of Idaho are denied their individual rights to assert their grievances through state government.

This entire constitutional conflict can be avoided by the Court recognizing that any specific interest of the United States can be adequately represented as *amicus curiae*.

Idaho asserts that the United States is a dispensable party to this litigation. The activities of the United States in the ocean, along the Columbia River and with the treaty fishermen are fixed. The United States is bound by statute and executive commitment to preserve the anadromous fishery. While limited participation of the United States would be desirable, this court has jurisdiction to bind the United States to previously committed obligations.

To the extent that the United States possess sovereign immunity regarding an aspect of this case, this court must narrowly construe this immunity and give great deference to the constitutional right of the State of Idaho to bring this action. The record in this case establishes that the position of the United States serves only to obfuscate the meritorious claim of Idaho. Moreover, the United States through legislation, commitments to the treaty Tribes and through agency activities has waived sovereign immunity.

The United States in dealing with the states and treaty Tribes has not acted in a vacuum. Contrary to the Master's Report the United States can be joined in this litigation to the extent necessary for this court to render a just adjudication of the issues presented.

EXCEPTIONS

I.

THE MASTER'S RELIANCE UPON THE CONCEPT OF SOVEREIGN IMMUNITY AND FED. R. CIV. P. 19 IS CONTRARY TO BASIC CONCEPTS OF FEDERALISM

Disputes among states involving natural resources and boundaries are as old as the federal system. The mechanism for resolution of disputes among states found in U.S. Const. art. III, § 2, Cl. 2 was a condition to the formation of the nation. Therefore, these disputes between former sovereigns are entitled to special constitutional significance.[6]

This action is brought by the State of Idaho as *parens patriae* on behalf of all citizens to protect a dwindling resource. Idaho's policy to protect these anadromous fish is expressed in both federal and state statutes.[7] The reliance by the Special Master upon the concept of sovereign immunity and Fed. R. Civ. P. 19 unnecessarily forecloses Idaho's right to participate in the federal system. Moreover, the right of Idaho's residents to enjoy and protect this unique resource is thereby barred.

The pertinent provision of art. III, § 2, Cl. 2 provides, "In all Cases affecting Ambassadors, other public Ministers and

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[6]Taylor, *Jurisdiction and Procedure of the Supreme Court of the United States*, 46 (1904) quoting from *The St. Lawrence*, 1 Black 522, 526, 17 L. Ed. 180, 183 (1862) states, "the Court could not, consistently within its duty, refuse to exercise a power with which the constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right."

[7]Idaho Code § 36-103 requires the State of Idaho to preserve and protect wildlife for the citizens of the state. *See Also* Appendix D.

Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction . . ."[8]

This constitutional grant of original jurisdiction is based upon strong policy considerations to insure that issues involving basic adjustments within the federal system will be heard by a tribunal having prestige commensurate with the status of the parties.[9]

It is Idaho's position that original jurisdiction actions are fundamental to constitutional government. Original jurisdiction instead of being a burdensome and archaic holdover of states' rights is an efficient mechanism for resolving disputes among states. Because of the important role given to original jurisdiction cases Idaho urges this Court to overrule the Special Master and find the United States a dispensable party to this litigation. Idaho further urges this Court to find that any interest the United States may have in this litigation is not protected by sovereign immunity and can be adequately represented by the United States as *amicus curiae.*

If unchanged, the report of the Special Master will encourage disharmony in the federal system not only among the three affected states, but also among other states which are now trying to resolve disputes through a diplomatic process. Moreover, individual citizens will be unable to assert their concerns through the mechanism of state govern-

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[8]U.S. Const. art. III, § 2. The implementing statute is 28 U.S.C. § 1251 (1952).

[9]Carson, the History of the Supreme Court of the United States, 174 (1902). "He [Chief Justice Jay] saw no incompatibility between suability and state sovereignty, and declared that as one state might sue another state in the Supreme Court, it was 'plain that no degredation to a state was thought to accompany her appearance in this Court.' "

ment. Without judicial resolution in this Court there will be little incentive to negotiate and this dispute between states will continue indefinitely.

A. Historically a Forum for Resolving State Disputes on the Merits Has Been Necessary for the Domestic Tranquillity.

In providing the Supreme Court with judicial power over controversies ". . . in which a state shall be a party . . ." U.S. Const. art. III, § 2, Cl. 2, the framers of the Constitution were establishing legal remedies necessary to create the nation. When the federal convention met in 1789 to draft the Constitution, the right of states to litigate disputes among themselves found in the Articles of Confederation was preserved. "This draft . . . as finally adopted took from the Senate the power to constitute a court to try disputes between the states respecting territory or jurisdiction . . . the entire jurisdiction of controversies between states was bestowed upon the Supreme Court . . ." *Missouri* v. *Illinois*, 180 U.S. 208, 223 (1900).

The reason art. III, § 2, Cl. 2 extends judicial power to controversies between states is, ". . . because domestic tranquillity requires that the contentions of states should be peaceably terminated by a common judiciary and, because in a free country justice ought not to depend on the *will of either of the litigants.*[10]

Supreme Court Rule 9 preserves the constitutional right of states to litigate through the Court's policy of flexible procedural requirements in original actions.

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[10]*Id.*, 126. (Emphasis added.)

B. Article III, Section 2, Clause 2 of the United States Constitution Must Be Construed in Light of the Basic Framework of the Federal System.

The purpose of the framers in providing for original and exclusive actions between the states was, as pointed out earlier, to provide a forum for resolving disputes among the states. Its function is to preserve the tranquillity between the states by allowing disputes to be resolved peaceably.[11]

The federal government is now attempting to use the sword of sovereign immunity to stop the State of Idaho from assuring a healthy return of anadromous fish in spite of the growing role of the United States as protector of the environment. This misuse of statutory policy has been addressed by Congress in eliminating sovereign immunity from agency actions contrary to the intent of law.

> As government programs grow, and agency activities continue to pervade every aspect of life, judicial review of the administrative actions of government officials becomes more and more important. Only if citizens are provided with access to judicial remedies against government officials and agencies will we realize a government truly under law.[12]

This recent growth in federal environmental regulations was not intended by Congress to disrupt the basic frame-

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[11]*See, Missouri* v. *Illinois*, 180 U.S. 208 (1900).

[12]H. R. Rep. No. 94-1656, 94 Cong., 2d Sess. represented in [1976] U.S. Code Cong. & Ad. News 6021, 6130 (hereafter "House Report"), explaining Congress' removal of the defense of sovereign immunity under 5 U.S.C., § 702.

work of the federal system.[13] In fact, many of the federal environmental statutes were designed to "conscript" state participation.[14]

Moreover, the use of these federal regulatory statutes to establish sovereign immunity for governmental actions creates a conflict between the constitutional right of states to bring original actions and the common law doctrine of sovereign immunity.

> . . . it suffices to point out that viewing sovereign immunity as a common law doctrine would effectuate the generally desirable result of leaving immunity as a question of policy, to be determined by Congress and adjusted to changing notions concerning the proper role of the doctrine.
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> * * *
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> Moreover, most commentators today are sharply critical of sovereign immunity and its persistence is often explained by the supposed constitutional compulsion behind the doctrine.[15]

This action presents a clear conflict between what remains of sovereign immunity and the constitutional right of Idaho to bring this action. As this Court has recently stated, "[t]he original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing and needs no legis-

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[13]In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) this Court reaffirmed the need for state governments to make decisions regarding conduct of internal governmental functions.

[14]Stewart, Richard B. *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L. J. 1196 (1977).

[15]*See*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 545, 546 (1977). This article contains an excellent discussion of the origins of sovereign immunity.

lative implementation." *California* v. *Arizona,* 59 L. Ed. 2d 144, 150 (1979).

The concept of immunity urged by the Master must give way to the explicit language of art. III. For, while ". . . some state governments may be ignorant or venal, many are far-seeing and courageous and not all wisdom reposes in Washington."[16]

The United States must not be allowed, through a tortured reliance on federal statutes and policies, to prevent the workings of the federal system.

II.

PARTICIPATION OF THE UNITED STATES AS *AMICUS CURIAE* CAN AVOID A GRAVE CONSTITUTIONAL CONFLICT

The conflict raised by the assertion of indispensability and sovereign immunity by the United States can be avoided by this Court. There is simply no specific interest of the United States asserted at this time which requires a finding of indispensability.

A. The Special Master Did Not Apply Supreme Court Rule 9 With the Procedural Flexibility Intended by the Supreme Court.

Rule 9 of the Supreme Court states in pertinent part, "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken *as a guide* to

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[16]Friendly, Judge, *Federalism: A Foreward*, 86 Yale L. J. 1019, 1034 (1977).

procedure in original actions in this court." (Emphasis added.)

When the Judiciary Act of 1789 authorized the Supreme Court to promulgate rules necessary for the conduct of business, the Supreme Court carefully reserved the right to deviate from the rules of procedure for original cases as the circumstances required. This flexibility is " . . . a distinctive feature of the procedure in original actions"[17] and has been preserved because of the constitutional significance of these actions to the federal system.

Such procedural flexibility is based upon three policy considerations, all of which favor the position Idaho is urging upon this Court. First, the goals of speedy and inexpensive determination of every action found in Fed. R. Civ. P. 1 are outweighed by the need to reach the merits, unaffected by procedural technicalities, in disputes involving quasi-sovereigns. Secondly, the uniqueness of original proceedings obviates the need for consideration regarding uniformity which is a foundation of the Federal Rules of Civil Procedure.[18] Finally, the states, in relinquishing their sovereign powers upon ratification of the Constitution, protected their right to settle disputes peaceably and on the merits.[19] "The 'highly important' dispute-settling power was vested in the National Supreme Court as to disputes which need litigating . . ."[20]

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[17]Comment, 11 Stan. L. Rev. 665, 686 (1959).

[18]*Id.*, 689.

[19]Beaver, *Common Law vs. International Law Adjudicative Rules in the Original Jurisdiction,* 20 Hastings L. J. 1, 3 (1968).

[20]*Id.*, 3, 4.

In applying these factors to the present litigation, the Special Master did not give adequate weight to the intent and purpose of Supreme Court Rule 9.

In sum, the purpose of Supreme Court Rule 9 is to resolve disputes in an efficient manner. The federal rules are at best only a useful and convenient guide in original proceedings. Because the federal rules were not intended for disputes among states, their technical application by the Special Master is improper and will only exacerbate relations between the states.

B. The Interests of the United States Can Be Adequately Presented as *Amicus Curiae* to the Court.

The vague assertions of the United States concerning indispensability and sovereign immunity can be protected by flexible application of the criteria and policies behind Rule 9 of the Supreme Court Rules.[21]

Even though the United States has taken no harmful action and Idaho has no cause of action against the United States or its trustees at this time, the Special Master concludes that the United States is indispensable. This conclusion has turned Fed. R. Civ. P. 19 into a guideline which fits no procedural situation.

Any speculative injury or interest presented by the United States can adequately and completely be presented to this Court as *amicus curiae*. In fact, once the trial on the merits has begun, the United States can serve a valuable role in assisting the Master by pointing out wherever the

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[21]Additionally, as pointed out in Argument III, the assertions of the United States do not satisfy Fed. R. Civ. P. 19.

issues being litigated affect the interest of the United States. Once these specific interests are identified the United States can be made a limited party. Precedent exists for such procedure.

In *Florida* v. *Georgia*, 17 How. 478, 493-496 (1894) the Court allowed the United States to file its proofs without becoming a party and also without the right to interfere in the pleadings and evidence presented by the states.[22] Under the procedure in *Florida*, the constitutional right of the states to an adjudication on the merits is vindicated while the United States is protected against any potential liability.[23]

This type of procedure preserves to the greatest extent possible the ability of the states to resolve disputes before the Court while avoiding the complex problems inherent in the growing regulation of natural resources by the federal government. If the Special Master's broad interpretation of indispensability is allowed to stand the federal government will be able to veto disputes between states without becoming accountable for its actions. This situation will become highly disruptive to the federal system and further reduce the role of the states as sovereigns.

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[22] *See also*, Harlan, J. dissenting, *California* v. *Southern Pacific Co.*, 157 U.S. 229, 262-271 (1895).

[23] In language particularly appropriate to this action the Court stated the policy behind original actions. "And it became, therefore, the duty of the Court to mold its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred." *Florida*, at 189.

III.

THE STATE OF IDAHO TAKES EXCEPTION TO THE SPECIAL MASTER'S FINDING THAT THE UNITED STATES IS AN INDISPENSABLE PARTY BECAUSE OF THE ACTIVITIES OF ITS AGENCIES AND BECAUSE OF ITS STATUS AS TRUSTEE FOR THE COLUMBIA RIVER TREATY INDIAN FISHERMEN

The Special Master concluded that the United States was an indispensable party to the instant action under the framework of Fed. R. Civ. P. 19. That determination was based on two findings. First, the Master found federal agencies are so involved in the management, protection and preservation of the anadromous fish resource that no decree allocating the resource among the states can adequately protect or determine each state's interest without the United States becoming a party. Master's Report, 4, 19, 22, 28. Second, it was determined that treaty Indians must be made parties so the decree can be enforced against them. Master's Report, 20, 28.

In applying Fed. R. Civ. P. 19 the Special Master has used a formalistic and rigid approach to the indispensability issue. This is contrary to the policy of the Federal Rules of Civil Procedure in general and Fed. R. Civ. P. 19 in particular. A pragmatic approach, looking at all of the particular facts and circumstances, should have been utilized in determining whether the instant case can proceed to adjudication in the absence of the United States as a party.[24]

[24]Notes of Advisory Committee on 1966 Amendments to Rules, Rule 19, 28 U.S.C. at 420.

A. The Special Master's Finding That Any Judgment Rendered by This Court Must Account for Every Possible Contingency is in Error.

Having concluded that joinder of the United States is necessary, the Special Master set forth the four criteria in Fed. R. Civ. P. 19(b) for the determination of whether to proceed or dismiss a case because of the absence of an interested person. Master's Report, 18. The first two criteria deal with the potential for prejudice to a non-party and the extent to which protective provisions are necessary to protect an absent person's interests. The Special Master concludes that no prejudice will occur if a decree is rendered in the absence of the United States as a party. Consequently, the first two criteria do not require the United States' presence as a party to the case at bar. Master's Report, 19.

The third criteria, whether a judgment rendered in the absence of a non-joined party will be adequate, is the basis upon which the Special Master recommends dismissal for failure to join an indispensable party. Master's Report, 22. The Special Master is concerned that the interrelation between the treaty fisheries, non-treaty fisheries, flow regimes, operation of fish passage facilities, programs of the federal agencies and control over the ocean catch exercised by a federal statute[25] cannot be provided for in a decree

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[25]The federal statute controlling ocean harvest is the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882.

With regard to anadromous fish the purpose of this Act is to conserve and manage the resource while in the ocean. 16 U.S.C. § 1801 (b) (1). Under the Act, the Pacific Fishery Management Council was established. 16 U.S.C. § 1852 (a). It is the council's function to prepare and continually review the regional fishery

with the parties now before the Court. Accordingly, the Special Master found that no decree is adequate if it does not address or control *all* interrelated factors. Master's Report, 20.

Idaho contends that all of these factors need not be addressed in order for an adequate decree to be had. The question is not whether all of the interrelated rights and duties of "interested" persons can be controlled, but whether control can be had over those which deal with the present inequitable allocation so that adequate relief to Idaho can be provided. Rarely can all interrelated factors be brought under the control of a problem solver so that the desired resolution is 100% certain. This general proposition is also true of the judicial resolution of legal problems. The courts cannot concern themselves with *everything* that might operate to thwart the desired effect of a decision. To do so would make litigation overly cumbersome, or, as in the instant case, an outright impossibility.

Although the United States is conceivably a "person to be joined if feasible," an application of the particular facts and circumstances of this case to Fed. R. Civ. P. 19 does not establish the need for dismissal. The policy underlying Fed. R. Civ. P. 19(b) is to settle disputes "in wholes" *whenever possible,* not to settle disputes in wholes or *not at all.* The Supreme Court has stated, ". . . there was no reason to

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management plan. 16 U.S.C. § 1852 (h). Idaho, Oregon and Washington are each represented by voting members of the Pacific Fishery Management Council and are directly involved in the decision-making process regarding ocean management under the Act. 16 U.S.C. § 1852 (b). Therefore, the defendant states should not be seen to assert federal indispensability concerning ocean management when they are in fact a voting voice in the establishment of off-shore harvest regulations under the federal statute.

throw away a valid judgment just because it did not *theoretically* settle the whole controversy." *Provident Bank & Trust* v. *Patterson,* 390 U.S. 102, 116 (1968). (Emphasis added.) Likewise, in the instant case, there is no reason to throw away the entire action because it does not *theoretically* settle the whole controversy.

However, the Special Master concluded that:

> A balancing of the Rule 19(b) factors shows on one side of the scale that non-joinder will result in no prejudice to the absent party and that Idaho has no adequate legal remedy. On the other side, the absence of the United States makes the entry of an adequate judgment impossible and tips the scales in favor of the conclusion that the United States is an indispensable party without which the action may not proceed. Master's Report, 22.

Idaho objects to that conclusion and submits that its litigation should not be dismissed because of an inability to resolve every conceivable issue in the absence of the United States.

B. The United States Is Not an Indispensable Party Because of the Activities of Its Various Agencies.

In asserting that the presence of the United States is necessary to give the Court jurisdiction over a number of possible problems, the Special Master raises issues which are not presented by Idaho. Idaho agrees that many of the problems facing management of anadromous fish resources are not solvable by judicial action. These kinds of problems are inappropriate for judicial resolution and need not be addressed in order to grant adequate relief in this case.

The legal controversy in the case at bar *should be limited* to determining the equitable allocation of certain upstream

anadromous fish runs among the Idaho, Oregon and Washington fisheries. Other related factors such as management of the ocean harvest, operation of the dams, and land management *are not material* to the issue of equitable apportionment. Federal involvement in these areas bears no relationship to the issue of whether the defendant states may continue to harvest these returning stocks of anadromous fish without consideration of Idaho's equities.

The inequity to Idaho occurs when these fish have reentered the Columbia River as adults. For that reason, downstream mortalities of juveniles are immaterial to the issue of allocation because only *adults* on their return migrations are harvested in the lower Columbia River commercial and sport fisheries. Most non-Indian harvests of adults on the mainstream Columbia occur in the waters below Bonneville Dam before these fish are subjected to any dam-caused mortalities on their upstream migration. These harvests are regulated at the discretion of the Columbia River Fish Compact agencies. The defendants should be required to consider such "after-their-harvest" losses of adults during upstream passage as a responsibility to be shared with Idaho, rather than to consider those fish "wasted."

Factors affecting the total supply of the resource do not necessarily concern the issue of how the available supply should be allocated among those claiming an interest in it. Because variables affect any natural resource, Idaho does not (and cannot practicably) claim an interest in a fixed number of anadromous fish requiring that all related matters *must* be brought under a Court decree to insure the requisite supply. To illustrate, if the long term and total

supply of water were an issue in water rights litigation, federal and state agencies would be "indispensable parties" in all such adjudications.

Federal agencies make decisions impacting on the anadromous fish resource. However, Idaho has no grievance against the federal government. The United States is committed to promoting and maintaining wildlife resources affected by the construction and maintenance of federal dams, power plants, reservoirs and the management of its land holdings. A list of major federal statutes which commit the United States to a policy of conserving, enhancing and protecting fish and wildlife resources is attached to this brief as Appendix D. The evidence demonstrates that federal agencies are active partners in programs to insure the continuance of the fish runs. The United States cannot reverse these statutory policies arbitrarily and still assert sovereign immunity.

Finally, it must be emphasized again that the United States has not exercised any control over allocations of fishery resources among competing users in the Columbia River Basin. The record clearly substantiates this point.[26] The rights and duties of the United States are fixed by federal statute and regulation. The allocation of fish resources in the Columbia River is not one of those rights or duties. Management of federal works projects, federal lands, or the ocean fishery is not a mechanism by which the United States can regulate the in-river harvest of anadromous fish. The rights, duties and responsibilities of the United States in this case *are not* as clear cut as those present in *Arizona* v. *California*, 298 U.S. 558, 571 (1936).

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[26]Record, 221, 244; Exhibit W-4 at Q-1.

The Supreme Court decision in *Nebraska* v. *Wyoming*, 295 U.S. 40, 42-43 (1935) is clearly more analogous since the states may allocate a fishery within their jurisdictions much the same way as Wyoming and Nebraska could allocate water resources within their jurisdictions. In the instant case the United States should be held dispensable because of the activities of its agencies for the same reasons as were set forth in *Nebraska*.[27]

C. The Master's Finding That the United States Is an Indispensable Party Because of Its Status As Trustee for the Columbia River Treaty Indian Fishermen is in Error.

The Warm Springs, Umatilla, Yakima and Nez Perce Tribes have treaty-secured fishing rights on the lower Columbia River. Master's Report, 5. The District Court of Oregon held in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969), *aff'd and remanded,* 529 F. 2d 570 (9th Cir. 1976) that fishermen from these tribes are entitled to the opportunity to take 50% of the harvest of upriver anadromous fish, (Master's Report, 12) and that case is presently pending under a five-year settlement agreement. Master's Report, 5.

The Special Master found there is no assurance that increased numbers of fish will reach Idaho waters and that therefore the relief requested will be inadequate under Fed. R. Civ. P. 19. Master's Report, 20. That finding is premised on three inter-related assumptions. First, that the treaty Indians will over-harvest the increased number of fish passing their fishing stations in violation of the settlement

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[27]Report of Special Master, 23, Cf. Texas v. Mexico 352 U.S. 991 (1954).

agreement reached in *Sohappy* v. *Smith*, and consequently deny Idaho any benefit of increased escapements. Second, that Oregon and Washington as parties to that agreement will not enforce its terms against the Indians. Finally, that Idaho has no means of enforcing the agreement against the treaty Indians. These assumptions are problematic. The reliance on these assumptions as a bar to adjudication of this case on the merits is contrary to the pragmatic policy of Fed. R. Civ. P. 19 (b). Here, the Special Master should have assessed the probability that these assumed events will come to pass. If substantive reasons deny the existence of any *one* of the three assumptions, then the question of adequacy of relief must be resolved in favor of Idaho.

No determinative evidence was presented that the treaty Indian fishery will act in bad faith and overharvest the fish runs. The Tribes are bound by court decree in *Sohappy* v. *Smith* to a fixed percentage of fish available for harvest. In the event that the existing settlement agreement in the *Sohappy* case is not extended beyond its term, the Tribes will be bound by the court decree providing opportunity to take 50% of the harvest. Therefore, the United States will be obliged to compel Tribal adherence to the court orders.

If for the purposes of argument one assumes that the treaty Indians were to overfish, the result would be contrary to the interests of Oregon and Washington because of disruption of existing harvest quotas under the *Sohappy* settlement agreement. Since a treaty Indian over-harvest poses a definite detriment to non-Indian fishermen, how can the Court assume that Oregon and Washington will not act to protect their interests? Because Oregon and Washington are in a court in which the treaty Indians have waived sovereign

immunity by suing the states, the defendant states are in a position to protect their rights under both the *Sohappy* settlement agreement and whatever equitable apportionment is arrived at by the Supreme Court in the instant case.

Finally, should all parties to *Sohappy* v. *Smith* fail to comply with the court sanctioned agreement, a third remedy exists. Idaho may seek intervention under Fed. R. Civ. P. 24 to compel adherence to the agreement's terms.

Idaho does not dispute the Indian allocation of the anadromous fishery established by the federal court. However, the settlement agreement not only secures to the Indian treaty fishermen a share of the fish, but also secures a share to non-treaty fishermen. Idaho is asserting its interest only in the non-treaty share and submits that the non-treaty share can be allocated among Oregon, Washington and Idaho without adversely affecting the Indians' share.

If non-Indian fishing below Bonneville Dam is restricted in the instant litigation, more fish will pass Bonneville and will be available for the Indians to more easily fill their quotas under the decree and settlement agreement in the *Sohappy* case. This can only benefit the Indian fishery by giving the treaty fishermen a greater opportunity to harvest their allotted share. A person's interest must be adversely affected by a decree rendered in his absence before he can be found indispensable. If the effect is beneficial, then that person is dispensable.

After reviewing Idaho's position, the Master found that:

> Idaho accepts these decisions [regarding treaty fishing rights on the lower Columbia River] and makes no complaint against the operation by the United States of the dams which affect both the downstream and upstream

> runs of fish. In the circumstances, *the rights of the United States will not be prejudiced if the action proceeds, and no protective provisions in the decree will be required.* Master's Report, 19. (Emphasis added.)

Since the Master has found that no prejudice will befall the Tribes, or the United States as their trustee, Idaho submits the United States is a *dispensable party* to this litigation. Because the United States will not be prejudiced if the action proceeds, the Court should not dismiss the present action without providing the opportunity for full development of facts and evidence at trial regarding the adequacy of judgment in the instant proceeding.

The Court must consider and balance the two possible results that a determination of the issue of indispensability will entail. If the Court decides that the United States is dispensable, Idaho can gain adequate protection for its interests in the anadromous fish runs. Moreover, Idaho will have the leverage necessary to achieve its ends through ". . . mutual accommodation and expert administration, not litigation" as the Special Master suggests. Master's Report, 24. Without this leverage Idaho has no chance of obtaining an equitable share of the fish through "mutual accommodation."

IV.

THE DOCTRINE OF SOVEREIGN IMMUNITY MUST BE NARROWLY CONSTRUED IN ORIGINAL AND EXCLUSIVE ACTIONS BETWEEN STATES

Over the last twenty five years there has been a growing recognition of the inappropriateness of the doctrine of sovereign immunity in a democratic society. The sovereign immunity concept is rapidly being replaced by a concept of

sovereign responsibility.[28] The reasons for this shift of policy are rooted in the structures of the American society. "It must be borne in mind that the sovereign immunity doctrine became established about one hundred years ago, long before the modern law of judicial review had developed."[29]

Modern concepts of government require this Court to retreat from the last bastion of sovereign immunity -- the original and exclusive action.

A. The Assertion of Sovereign Immunity by the Federal Government Serves Only To Obfuscate the Issues Presented In This Case.

It is difficult to understand why the government in its role as protector of the anadromous fisheries[30] should desire or have the ability to obstruct Idaho's litigation. The rationale is found in the origin of the concept of sovereign immunity. In reviewing that concept, Congress stated:

> The doctrine of sovereign immunity probably descended from the tenet of medieval English law that the "King can do no wrong." Yet even today, 200 years after the American revolution, the doctrine stands as a barrier to the redress of just grievances against the United States Government. To the extent that this obsolete immunity doctrine prevents the orderly, rational review of actions of Federal officers, it is inconsistent with the principles of accountable and responsive Government.[31]

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[28]2 Davis, Administrative Law Treatise, § 17.01 at 491, 492 (1958).

[29]Cromton, Roger C. *Non-statutory Review of Federal Administrative Action: the Need For Statutory Reforms of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. R. 387, 425 (1970) (hereafter "Cromton").

[30]See Appendix D.

[31]S. Rep. No. 94-996, 94 Cong. 2d Sess. 3 (1976) (hereafter "Senate Report").

Thus, the doctrine of ". . . sovereign immunity has been largely crumbling, and today only remnants remain."[32]

The United States in this action has asserted the doctrine of sovereign immunity in its most elemental form.

> The United States submits that it is an indispensable party to this action and that this Court cannot grant complete relief in its absence. The United States contends that the complaint of the State of Idaho therefore must be dismissed. Memorandum of United States as Amicus Curiae dated April 6, 1978, at 5.

The report of the Master essentially agrees with this position and concludes; "agencies of the United States control the spills, the states do not; they can only request." Master's Report, 24.

This assertion of sovereign immunity is in error and serves only to allow the executive branch to thwart meritorious litigation.

Reliance upon sovereign immunity has created a confusing and artificial state in the law which results in unjust results and wasted effort.

> The doctrine of sovereign immunity fulfills these unpleasant expectations by distracting attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the *sophistries*, false pretenses, and unreality of present law.[33]

Congress has moved to eliminate the vitality of this concept of immunity.

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[32]2 Davis, Administrative Law Treatise § 17.01 at 492 (1958).

[33]Cromton at 420. The author further decries, "The litigating practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year.

B. The United States Has Waived Its Sovereign Immunity To Suits Seeking To Protect Anadromous Fish.

It is important to note that the United States in asserting sovereign immunity to the instant action failed to explore the extent of the alleged immunity. Idaho's position is that the United States has waived sovereign immunity in this action. The United States has for the most part acted in Idaho's interest and because of this is a dispensable party.

The Master found, however, that the United States was indispensable because of (1) the operation of the eight dams on the Columbia and Snake Rivers, (2) the management of the off-shore fishery, and (3) the Indian treaty rights. Master's Report, 17, 19, 24. A look at each of these areas of indispensability reveals that the United States has either waived sovereign immunity by statute or does not possess sovereign immunity.

1. The Administrative Procedures Act, 5 U.S.C. § 702 (1976) Specifically Waives The Sovereign Immunity of The United States.

In 1976 Congress amended the Administrative Procedures Act, 5 U.S.C. § 551, et seq. (1976) to specifically waive the sovereign immunity of the United States for,

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof *acted* or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. 5 U.S.C. § 702.

The purpose of this amendment was expressed by the Department of Justice in the following comments on the proposed bill:

> Indeed, if the present bill is properly understood and properly applied by the courts, it is likely to produce a more stable and predictable system of immunity from suit than the present doctrine . . . because it will be a system directly and honestly based upon relevant governmental factors rather than upon a medieval concept whose real vitality is long since gone and which we have tried vainly to convert to rational modern use.[34]

The Department of Justice went on to state that the intent of the drafters of the bill was to have cases disposed of upon their merits or upon more substantial legal grounds.

> To the contrary, one of the very premises of the proposal is the fact that many (indeed, I would say most) of the cases disposed of on the basis of sovereign immunity could have been decided the same way on other legal grounds, such as: lack of standing; lack of ripeness . . . .[35]

Thus, the purpose of this legislation was to remove the defense of sovereign immunity as a bar to judicial review of federal administrative action.

The present action is precisely the type of federal action intended by Congress to be judicially reviewed. *SCM Corp.* v. *United States,* 450 F. Supp. 1178 (Cust Ct. 1978).

This clear unequivocal waiver of immunity, coupled with the many environmental statutes [36] which require the federal government to preserve and protect the anadromous

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[34]Senate Report, 25.

[35]*Id.*, 26. Other defenses mentioned by the Department of Justice are ripeness, availability of an adequate remedy in other court, statutory preclusion of judicial review, commission of matter to agency discretion, privilege, exhaustion, and political question doctrine. At 25-26.

[36]Appendix D to this brief contains a listing of some of the statutes which require the federal government to preserve and protect the anadromous fishery.

fishery resources, eliminates the sovereign immunity of the United States in this case.

In fact, this Court recently held that a similar waiver of sovereign immunity in quiet title actions against the federal government, 28 U.S.C. § 2409 (a) (1976) applied to all federal courts including the United States Supreme Court in its exercise of original and exclusive jurisdiction. *California* v. *Arizona*, 59 L. Ed. 2d 144 (1979).

In light of these provisions and other specific statutes a closer look at the Master's ruling reveals that there are no grounds for the alleged sovereign immunity of the United States.

2. The United States Is Not Protected By the Doctrine of Sovereign Immunity in Operation of the Dams or in Management of the Ocean Fishery.

As pointed out earlier the United States is committed by statute to protecting and maintaining wildlife resources affected by the construction and maintenance of federal dams, power plants, reservoirs, and the management of its land holdings. Contrary to the Special Master's assertions, these commitments do not allow the federal government to operate these facilities as it pleases.[37] In fact such commitments allow the State of Idaho and private citizens to sue the United States for actions contrary to sound management. These statutes in fact waive sovereign immunity of the United States.

To the extent these federal environmental statutes do not waive sovereign immunity, Section 702 of the Administra-

[37]Master's Report, 24.

tive Procedures Act does. In fact, this statute was designed to make older executive departments subject to suit.

> Unfortunately, these special statutes do not cover many of the functions performed by the older executive departments, such as the Department of State, Defense, Treasury, Justice, Interior, and Agriculture. In these instances judicial review is available, if at all, through actions involving matters which arise "under the *Constitution, laws,* or *treaties* of the United States" as provided in Section 1331 of Title 28.[38] (Emphasis in original.)

The United States cannot arbitrarily reverse its policies protecting the anadromous fishery resource without liability under these statutes.

3. The United States Government Does Not Possess Sovereign Immunity Due to its Role as Trustee for the Tribes.

The final assertion by the Special Master is that the United States is an indispensable party to this litigation because of its role as trustee to the Indian tribes. The Master concludes that since the United States possesses sovereign immunity, Idaho's action must be dismissed. Master's Report, 22.

This analysis places the United States in a position of unaccountability for its actions. That position is erroneous.

The United States and the trustee Indian Tribes do not act in a vacuum. The *Sohappy* v. *Smith* settlement agreement, to which the United States, the Indian Tribes and the States of Oregon and Washington are parties, creates duties and liabilities upon those parties.[39]

[38]House Report, 6125.

[39]The settlement agreement is attached as Appendix A.

In *Sohappy* v. *Smith,* 302 F. Supp. 899 (D. Ore. 1969) the lower river Tribes sued to, " . . .[s] eek a decree of this court defining their treaty right 'of taking fish at all usual and accustomed places on the Columbia River . . . ' and the manner and extent the State of Oregon may regulate Indian fishing." *Sohappy*, 903. The United States in that action explicitly recognized " . . . [t]he need for regulation of Indian commercial fishing on the Columbia River to protect fish stocks." *Sohappy*, 906. The decision of the court resulted on February 8, 1977, in a court order adopting the settlement agreement.

This agreement creates limitations upon the United States and Indian Tribes to " . . . maintain, perpetuate and enhance anadromous fish and other fish stock originating in the Columbia River . . . ."[40] The agreement recognizes that there has been " . . . a continual decline of some runs of anadromous fish in the Columbia River system."[41]

Besides broad general statements of intent, the *Sohappy* settlement agreement contains specific allocations of fish available for harvest which binds all parties.

The take of fall chinook salmon, spring chinook salmon and summer steelhead are specifically limited.[42] These limitations bind all the signatories and, contrary to the Master's Report, are binding obligations upon the United States.

The United States does not possess sovereign immunity to ignore this agreement and its goals. The United States is

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[40]Appendix A at A-1.
[41]Appendix A at A-2.
[42]Appendix A at A-3.

bound by court order to comply. Should the Department of the Interior fail to compel tribal adherence with the *Sohappy* settlement agreement, Idaho can seek intervention under Fed. R. Civ. P. 24 to compel enforcement of its terms. This intervention would be only to enforce the agreement and not for the purpose of apportionment of the fish runs between the Indian Tribes, Oregon, and Washington.

It is clear that Idaho possesses a " . . . claim or interest relating to the property or transaction which is the subject of the action . . . ." Fed. R. Civ. P. 24 (a) (2). Since Idaho would be disadvantaged by the acts of the United States, Idaho would be ". . . so situated that disposition of the action may *as a practical matter* impair or impede his ability to protect that interest . . . ." (Emphasis added.) Fed. R. Civ. P. 24 (a) (2). Any refusal of the United States to enforce that agreement would clearly give an injured party a right to intervene. *Smuck* v. *Hobson*, 408 F. 2d 175, 179, 180 (D.C. Cir. 1969).

Moreover, the United States can be subjected to the jurisdiction of the Court if the Department of the Interior or any officer fails to act to enforce the *Sohappy* agreement.[43] As pointed out earlier, the United States simply does not possess sovereign immunity to violate the laws of Congress.[44]

The Indian Tribes themselves are not without enforceable obligations. In entering into the settlement agreement

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[43]5 U.S.C. § 702 (1976). This is precisely the type of agency action which Congress sought to have reviewed by courts. No conceivable governmental policy can be forwarded by allowing the United States to refuse to comply with its obligations.

[44]Appendix D contains a listing of statutes which effectively waive the sovereign immunity of the United States.

and protracted litigation with Oregon and Washington, the Indian tribes have waived whatever sovereign immunity they may have possessed.[45]

To the extent necessary to fashion a decree in this action there is no tribal immunity from suit. Individual members of the Indian Tribes have no immunity for violations of the agreement. *Puyallup Tribe* v. *Washington Game Dept.*, 433 U.S. 165, 167 (1977). While wholesale violations of the *Sohappy* agreement by the Tribes should not be presumed, those violations could be reviewed. The Indian Tribes simply do not have sovereign immunity to do as they please. "No such fair apportionment could be effective if the Indians received the power to take an unlimited number of anadromous fish within the reservation." *Puyallup*, at 175.

In an earlier decision this Court placed the issue in clear perspective.

> Rights can be controlled by the need to conserve a species; . . . the police power of the state is adequate to prevent the steelhead from following the fate of the passenger pigeon and the treaty does not give the Indians a federal *right to pursue the last living steelhead until it enters their nests. Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44, 49 (1973) (Emphasis added.)

Any decree rendered by the Supreme Court allocating fish to the State of Idaho can be enforced against the United States, Indian Tribes and members to the extent their ac-

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[45]The extent of Tribal sovereign immunity is even more vague and complex than that of the United States. Idaho agrees with Justice Blackman's concurring opinion in *Puyallup Tribe* v. *Department of Game of Washington,* 433 U.S. 165, 178 (1977). "I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 54 L. Ed. 894 (1940).

tions violate the *Sohappy* settlement agreement. Idaho does not seek to disrupt the agreement. Idaho will, however, seek to guarantee its enforcement if necessary.

C. Contrary To the Master's Conclusion the United States, If Necessary For Relief, Can Be Brought Before This Court.

This analysis of the doctrine of sovereign immunity establishes that the United States has not acted in a vacuum in its dealings with the states and Indian Tribes. The United States through Acts of Congress and the executive branch has waived any sovereign immunity it may have possessed.

Contrary to the Master's conclusion, the United States can be joined to the extent necessary for this Court to achieve a just adjudication of the issues presented.

V.

IDAHO'S PURSUIT OF EQUITABLE DIVISION OF THE NON-INDIAN ANADROMOUS FISHERY IS SUSCEPTIBLE TO JUDICIAL DETERMINATION AND ENFORCEMENT WHICH WILL NOT BE UNDULY BURDENSOME TO THE COURT

Again the Special Master has stated that the Court uniformly adheres to a policy of allowing full development of facts in original actions. Master's Report, 16-17. Idaho submits that a complete hearing upon the merits in the instant case would result in a judicial decree which could allocate the existing non-Indian fishery without disturbing the treaty secured and court allocated Indian fishing rights on the Lower Columbia River. To the extent that the United States has a qualifiable interest, it can be protected by participating as *amicus curiae* or being joined as a party.

Idaho submits further that the Court should hear the full development of facts before determining the feasibility of judicial resolution. Accordingly, Idaho takes exception to the Special Master's finding that, "[a]ny decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction." Master's Report, 21. Such a finding was based upon reasoning that the court in *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Ore. 1969) found continuing jurisdiction necessary. In the instant litigation, any finding of need for continuing jurisdiction presupposes the bad faith of the defendant states and should await a full hearing on the merits.

If necessary, the Court could follow a practice it has used in the past regarding retention of jurisdiction to allow the parties to apply for later relief, such as modification or enforcement of a decree. *See Wisconsin* v. *Illinois*, 28 U.S. 696 (1930); *New Jersey* v. *New York*, 282 U.S. 336 (1931); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922). Idaho does not deny that subsequent modification of any decree herein may be necessary as the equities of production, passage mortalities, run size and harvest change. However, Idaho contends that a daily requirement of continuing jurisdiction will be unnecessary. In the event said conditions change beyond those contemplated in the original decree, modification under the retained jursidiction of the Court would be appropriate.[46]

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[46]The mere fact that a decree may be burdensome does not justify refusal by this Court to hear Idaho's claim. "But the efforts at settlement in this case have failed. A genuine controversy exists, the gravity and importance of the case are apparent. The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution. *Nebraska* v. *Wyoming*, 325 U.S. 589, 617 (1944).

VI.

THE ALTERNATIVE OF MUTUAL ACCOMODATION AND EXPERT ADMINISTRATION IS NOT PRESENTLY AVAILABLE IN THE CASE AT BAR

The Special Master concludes that the solution to all issues presented is mutual accommodation and expert administration. Master's Report, 24. Idaho does not dispute this conclusion, but asserts that it is the role of the judiciary to resolve conflicts between parties when settlement cannot be reached.

For years Idaho has sought admittance into the Oregon-Washington Columbia River Fish Compact, only to be rebuffed. This compact was established in 1918 to promulgate regulations based upon the mutual consent of the defendant states regarding the take of fish in the Columbia River, a substantial portion of which are Idaho bound. As the Special Master stated, "Idaho was not a party to the compact and its efforts to become a party have failed." Master's Report, 6. Furthermore, efforts to settle the present litigation have proved fruitless. As a consequence, Idaho continues to seek resolution of this controversy in the only available forum, the United States Supreme Court.

If mutual accommodation and expert administration existed, Idaho would have no need to be before the Court. The difficulty of achieving relief through accommodation with the defendant states and the tribes is evidenced by the similar frustration of the Department of Justice shown in Appendix C. Since the United States was unable to gain compromise under threat of intervention, it will be impossible for Idaho under dismissal without prejudice.

Idaho contends its downstream neighbors continue to harvest the upriver runs of anadromous fish without proper consideration of the spawning escapement and fishery needs of Idaho. Idaho takes exception to the Special Master's finding that: "[t]he preservation and apportionment of the anadromous fishery of the Columbia River System present complex and interrelated environmental, social, economic, legal, political and philosophical conflicts not solvable by judicial action." Master's Report, 24. The *preservation* of Idaho's anadromous fish runs can only be secured by an equitable *apportionment* of the resource, downstream. The issue is of great importance and its complexity should present no bar to judicial resolution. Idaho submits the Court should allow full presentation of the evidence on the merits.

CONCLUSION

For the above reasons Idaho urges this Court to find that the United States is a dispensable party to this litigation and that any interest of the United States can be protected by participating as *amicus curiae* or by joinder for a limited purpose.

Only strong judicial initiative can resolve this dispute and prevent the inevitable diminution of Idaho's anadromous fish runs.

DATED this 1st day of May, 1979.

DAVID H. LEROY
ATTORNEY GENERAL
STATE OF IDAHO
W. HUGH O'RIORDAN
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES
DIVISION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 1979, three copies of PLAINTIFF'S EXCEPTIONS TO REPORT AND SUPPLEMENTAL REPORT OF THE SPECIAL MASTER ON THE AFFIRMATIVE DEFENSES OF OREGON AND WASHINGTON TO THE COMPLAINT OF IDAHO were mailed, postage prepaid, to:

DIXY LEE RAY
GOVERNOR
OFFICE OF THE GOVERNOR
Olympia, Washington 98504

SLADE GORTON
ATTORNEY GENERAL
TEMPLE OF JUSTICE
Olympia, Washington 98504

EDWARD B. MACKIE
DEPUTY ATTORNEY GENERAL
TEMPLE OF JUSTICE
Olympia, Washington 98504

VICTOR ATIYEB
GOVERNOR
OFFICE OF THE GOVERNOR
Salem, Oregon 97310

JAMES A. REDDEN
ATTORNEY GENERAL
STATE OFFICE BUILDING
Salem, Oregon 97310

BEVERLY B. HALL
ASSISTANT ATTORNEY GENERAL
State Office Building
Salem, Oregon 97310

RAYMOND P. UNDERWOOD
ASSISTANT ATTORNEY GENERAL
State Office Building
Salem, Oregon 97310

HONORABLE WADE MCCREE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
Washington, D.C. 20530

WENDELL WYATT
Souther, Spaulding, Kinsey, Williamson & Schwabe
1200 Standard Plaza
Portland, Oregon 97204
ROBERT E. SMYLIE
300 Simplot Building
Boise, Idaho 83702

and further that all parties required to be served were served.

DAVID H. LEROY
ATTORNEY GENERAL
State of Idaho

(Appendix Follows)

APPENDIX

APPENDIX A

A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaries above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks.

The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline

of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.

(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any given run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present production of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, in-

cluding but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjustments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocations in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U.S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed-upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.

(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by

mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of *U. S. v. Oregon,* Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are based upon the premise that the marine area catches in U.S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in *U. S. v. Oregon,* Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are *adult* fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River

above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

Fish Management Plans.

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent *Available Fish* for *Harvest* and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish *entering* the Columbia River which are *destined* to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total *in-river* run size.

(3) Additional fish above escapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide

and maintain a minimum average *harvestable* run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include *in-river* commercial and sport harvest as allocated by the appropriate agencies.

Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish *entering* the Columbia River *destined* to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. These fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 and 150,000 fish. Treaty ceremonial and subsistence fishing for spring chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.)

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish *entering* the Columbia River *destined* to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above Lower

Granite Dam shll be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forgo a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between *February 1*,and *April 1*.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is adopted by the undersigned this 25th day of February, 1977.

/s/ _____
ROBERT W. STRAUB
GOVERNOR OF OREGON

/s/ _____
DIXY LEE RAY
GOVERNOR OF WASHINGTON

/s/ _____
HAROLD CULPUS
CONFEDERATED TRIBES OF THE
WARM SPRINGS RESERVATION
OF OREGON

/s/ _____
WATWIN POTMAN
CONFEDERATED TRIBES & BANDS
OF THE YAKIMA INDIAN NATION

/s/ _____
LESLIE MINTHROW
CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION

/s/ _____
RICHARD A. HALFMOON, CHAIRMAN
NEZ PERCE TRIBE OF IDAHO

/s/ _____
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO

UNITED STATES
OF
AMERICA

/s/ _____
JOHN HOUGH
SPECIAL ASSISTANT TO THE
SECRETARY OF THE INTERIOR

APPENDIX B
UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Honorable James W. Moorman
Assistant Attorney General
Land and Natural Resources Division
U. S. Department of Justice
Washington, D.C. 20530

Re: *Idaho v. Washington and Oregon*

Dear Mr. Moorman:

The purpose of this letter is to forward the position of the Department of the Interior on United States intervention in the above referenced case. This will supplement our view of March 6 and 21, 1978.

Based upon review of the equitable and legal considerations involved, we recommend that the United States intervene in that case as a party. Any other position would deny Idaho its day in court and work a substantial injustice to that State's rights. Moreover, this Department, and the United States generally, has a trust obligation to eschew any derrogation of the treaty secured fishing rights of the Shoshone-Baunock Indians of the Fort Hall Indian Reservation.

This position is not inconsistent with our obligations to those tribes with adjudicated rights on the lower Columbia River. The rights secured to those must be fully protected in any litigation to which the United States is a party.

Sincerely,
Leo M. Krulitz
Solicitor

APPENDIX C
UNITED STATES GOVERNMENT
MEMORANDUM

Date: January 30, 1979

Reply to Attn. of: Louis F. Claiborne

Subject: *Idaho v. Oregon and Washington, No. 67, Original*

To: The Solicitor General

The question is whether the United States, an indispensable party enjoying sovereign immunity, ought to intervene so as to allow the action to proceed. I recommend *NO INTERVENTION*.

1. In March 1975, the State of Idaho (on the relation of the then Governor, now Secretary, Andrus) filed an original complaint against the States of Oregon and Washington asking the Court (1) to require the two defendant States to admit it to the Columbia River Fish Compact and (2) to order an equitable apportionment of the anadromous fishery of the Columbia River basin (which includes the Snake River and its Idaho tributaries, the Clearwater and the Salmon, important breeding grounds for salmon and steelhead). Oregon and Washington opposed leave to file the complaint alleging, *inter alia*, that the United States was an indispensable party which had not consented to suit.

In October of the same year, the Court asked our views. We consulted the Department of the Interior, which then opposed intervention. Our response to the Court was somewhat equivocal. Without clearly saying so, we suggested the United States was an indispensable party because of the treaty-protected fishing rights of four Indian Tribes, whose interests would be effected by any apportionment between

the States. We adverted to possible intervention as a way of overcoming this obstacle, but left that decision open. We urged denial of the motion for leave to file "at this time," pointing out that the two defendant States were (as we wrongly believed) about to admit Idaho to the Compact.

The Court heard oral argument on the motion in November 1976 and rendered a *per curiam* opinion in December. 429 U.S. 163. Leave to file was granted, limited to the prayer for apportionment and expressly leaving open whether the complaint stated a justiciable claim and whether the United States was an indispensable party.

In due course, the matter was referred to Judge Breitenstein as Special Master. 431 U.S. 952. We had an observer at the hearings and ultimately (in April 1978) filed a brief with the Master expressly asserting the indispensability of the United States, indicating that we would not intervene, and urging dismissal of the action. This was then the position urged upon us by the Department of the Interior.

At the end of July 1978, the Special Master submitted to the parties his draft Report. It concluded that the United States was an indispensable party and accordingly recommended dismissal. Judge Breitenstein scheduled a hearing on the draft report, ultimately fixed for November 8. A month earlier, he wrote us asking if we adhered to our decision not to intervene.

Just before the scheduled hearing, we were approached by the Shoshone-Bannock Tribe of the Fort Hall Reservation in Idaho, who claim a treaty right to take fish from a southern fork of the Salmon River, an Idaho tributary of the Snake River, which, in turn, flows into the Columbia. The Tribe, supported by Idaho, asked us to intervene to protect those

rights. We asked the Special Master for time to consider that request and he agreed to delay filing his report until February 1. He made it clear that no further postponement would be granted.

2. At this point, I initiated discussions with the Tribe's attorneys and other interested parties. After consulting with the Associate Solicitor for Indian Affairs at Interior, Myles Flint (Chief of the Indian Resources Section of the Lands Division) and I went to Portland and conferred, separately, with attorneys for the Shoshone-Bannock Tribe, attorneys for the four Tribes with recognized treaty fishing rights on the Columbia River, and the Attorney General of Oregon and the Assistant Attorney General of Washington.

We explored the possibility of persuading the two States and the four Tribes, parties to a consent judgment in *United States v. Oregon* in the Oregon district court, to amend the existing apportionment plan to allow more fish into Idaho, some of which would reach the traditional fishing grounds of the Shoshone-Bannock. There was some indication that this might be agreed with respect to runs larger than those recently available.

The State of Idaho now renewed its efforts to change the government's position. Myles Flint and I attended a meeting of the Idaho emissaries with Secretary Andrus and Mr. Flint attended another at the Department of Agriculture. I have since heard repeatedly from the Shoshone-Bannock attorneys and have had a long conversation with the Attorney General of Idaho. After those meetings, and with the concurrence of the Solicitor of Interior and the Lands Division, I circulated a concrete proposal to secure a greater escapement of fish into Idaho when the runs improved. The sugges-

tion was that acceptance of this compromise, or something like it, would probably allow us to continue blocking the original action. That was on December 18.

In due course, replies were received. Three of the Tribes party to the *Oregon* settlement indicated their refusal of the proposal. The attorney for the Nez Perce Tribe has not replied. The State of Oregon accepted my proposal. The State of Washington, however, has rejected it. Both Mr. Flint and I have held long telephone conversations with Washington Deputy Attorney General Mackie, to no avail. We must accept the fact that, in that quarter, our bluff has been called.

Yesterday, we received a new recommendation from the Department of the Interior, urging intervention. It was personally determined by Secretary Andrus, contrary to the view voiced only days before by his lawyers. No recommendation has been received from the Department of Agriculture. As you know, the Senators from Idaho and Oregon have written in support of the stance of their States.

3. There are three arguments in favor of intervention: (1) Our duty as trustee to the Shoshone-Bannock Tribe — which is no less than our conflicting duty to defend the status quo insofar as it favors the four Tribes party to the *Oregon* settlement; (2) the apparent justice of Idaho's claim that it produces many (if not most) of the fish and yet enjoys only a minimal share of the harvestable resource, which is "fished out" before the fish return to Idaho waters; and (3) the principle that, wherever the merits lie, we ought not invoke our indispensability and sovereign immunity to block *bona fide* litigation between States when no other forum is available for resolution of the dispute.

The claim of the Shoshone-Bannock Tribe, so far as we can determine, is not urgent. It appears that the Tribe presently satisfies most of its subsistence and ceremonial needs — which is all that is sought. The Tribe's concern, at least primarily, is for the future, in the event the escapement diminishes or Idaho ceases to recognize the Indian priority. It is, moreover, an unfortunate reality that assuring one harvestable fish for the tribe probably requires some eight or ten to go by the fisheries on the mainstem of the Columbia. This means very substantially penalizing both Indian and non-Indian fishermen on that river, and also involves sacrificing three or four fish to death in the effort to surmount all the intervening dams. In all the circumstances, the claim of the Shoshone-Bannock is not strong enough, in my view, to justify intervention.

Idaho's claim is somewhat stronger. The present plan, adopted by the district court in the *Oregon* case, provides that Idaho's sports fishermen shall never see more than 7,500 harvestable salmon, no matter how large the run. This seems inequitable. Nor does Idaho have any obvious alternative forum to test its claim. If it sought to intervene in the *Oregon* district court case, it would probably be compelled, at this late date, to accept the existing plan, until it expires some two years hence. Besides, any posture adversary to Oregon and Washington would presumably defeat the jurisdiction of the district court.

On the other hand, there are powerful arguments against this original suit. There *is* an existing settlement which ought not lightly be disturbed. We *do* have an obligation to the four Tribes on whose behalf we sought and obtained a judgment in the *Oregon* case. Also, if we were to intervene in

the original action, it seems doubtful if we could prevent opening up to controversy the federal government's management of the off-shore fishery and our operation of the Columbia River dams — very complex and delicate issues. And, finally, we may question whether the Supreme Court is equipped to exercise the continuing jurisdiction necessary to enforce any judgment it may render. In sum, the case is to be avoided if, in conscience, that can be done.

On balance, I believe the objections to the action counsel us to continue to block it. Even the State of Washington has indicated its willingness to concede something to Idaho if fish passage conditions are improved. We can continue to press the States of Oregon and Washington to modify the *Oregon* plan — to which we are a party — when it comes up for renewal in two years' time. For the moment, I would urge the Court to dismiss Idaho's suit, without prejudice to refiling if no other remedy is forthcoming.

APPENDIX D

MAJOR FEDERAL STATUTES COMMITTING THE UNITED STATES TO A POLICY OF CONSERVING, PROTECTING AND ENHANCING FISH AND WILDLIFE AND THEIR HABITAT

1. National Agricultural Research, Extension and Teaching Policy Act of 1977, 7 U.S.C.A. § 3101(8) (H) (1977)

2. 16 U.S.C. § 460 (d) (1976)

3. 16 U.S.C. § 460 (k-l) (1976)

4. 16 U.S.C. § 460 (aa) (1976)

5. 16 U.S.C. § 460 (gg) (1976)

6. Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (1976)

7. 16 U.S.C. §§ 582(a), 582(a-6) (1976)

8. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 663 (1976)

9. National Wildlife Refuge System Administration Act Amendments of 1974, 16 U.S.C. § 668dd(a) (1976)

10. 16 U.S.C. §§ 670(g), 670(h) (1976)

11. 16 U.S.C. § 683 (1976)

12. Fish and Game Sanctuary Act, 16 U.S.C. § 694 (1976)

13. Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(a), 742(f) (1976)

14. 16 U.S.C. §§ 755, 756 (1976)

15. Anadromous Fish Conservation Act, 16 U.S.C. §§ 757(a), 757(b) (1976)

16. Federal Aid in Fish Restoration Act, 16 U.S.C. § 777 (1976)

17. Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. § 779(a) (1976)

18. Black Bass Act, 16 U.S.C. § 852 (1976)

19. Wilderness Act, 16 U.S.C. §§ 1131 et seq. (1976)

20. Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (1976)

21. Endangered Species Act of 1973, 16 U.S.C. § 1531 (1976)

22. National Forest Management Act of 1976, 16 U.S.C. § 1604(g) (1976)

23. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801, 1851 (1976)

24. Rivers and Harbors Appropriation Act of 1888, 33 U.S.C. § 608 (1976)

25. Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251(a) (2), 1252, 1312 (1977)

26. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq.

27. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a) (8) (1976)